

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

AIR SERV CORPORATION ^{1/}

Employer

and

Case 9-RC-17935

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 74, AFL-CIO

Petitioner

DECISION AND ORDER

I. INTRODUCTION

The Employer provides certain auxiliary services for various airlines throughout the United States. The Petitioner seeks to represent the Employer's employees who perform cabin cleaning and lavatory maintenance services at the Cincinnati/Northern Kentucky Regional Airport (Cincinnati airport) for Delta Airlines (Delta). The Employer asserts that because of the amount of control that Delta has over its operations it is subject to the jurisdiction of the Railway Labor Act (RLA) and therefore the National Labor Relations Board (Board) lacks jurisdiction under Section 2(2) of the National Labor Relations Act (Act). On the other hand, the Petitioner takes the position that the Board should assert jurisdiction in this matter. There is no history of collective bargaining affecting any of the employees sought to be represented.

Because the amount of control exerted by Delta over the Employer in the instant case is comparable to that found in *Sky Valet*, 319 NLRB 1243 (1995), where the Board declined to assert jurisdiction over the employers' operations similar to those of the Employer, I find that the Board does not have jurisdiction in this matter. In describing how I arrived at this conclusion, I will first present the factual background of the instant case and set forth generally the law in this area. Finally, I will compare those factors leading the Board to conclude that it had no jurisdiction in *Sky Valet* to those found in the case sub judice. ^{2/}

^{1/} The name of the Employer appears as corrected in the record.

^{2/} In reaching my conclusion, I have fully considered the briefs and arguments of the parties.

II. FACTUAL BACKGROUND

The Employer, a contract service company, supplies equipment and manpower for use in the aviation industry. Its corporate headquarters are in Atlanta, but it has operations in at least ten other metropolitan areas; including the airport that services the Cincinnati, Ohio metropolitan region, which is the only location involved in this proceeding. The Employer provides various services to Delta and five other air carriers at the Cincinnati airport. The master contract between the Employer and Delta applicable to the Cincinnati airport requires the Employer to provide cabin cleaning, lavatory, sky cap, transportation, and passenger assistance services to Delta and Delta customers. The Petitioner seeks to represent those employees who work within the Employer's Delta "cabin service" operations, referred to by the Employer as cabin and lavatory agents. The only other employees grouped by the Employer into this aspect of its operations are cabin security employees – unarmed employees who primarily do security screening work. There are approximately 180 cabin and 20 lavatory agents. The cabin agents, in general, clean and stock aircrafts' cabins, while the lavatory employees service the lavatories on the aircraft.

The Employer's Cincinnati airport operations are conducted from what is referred to as the "Delta Cabin Facility." This facility is a two story building, with the lower floor utilized as warehouse space with a few small offices, and the upper level containing the remainder of the Employer's local offices and a meeting room. Delta owns the facility and provides its use rent free to the Employer. The warehouse space is used to store cleaning supplies and tools used in cleaning the interior of aircraft and servicing aircraft lavatories, such as cleaning fluids, vacuums, mops, brooms, garbage bags etc. These supplies are ordered from vendors designated by Delta and Delta pays the vendors directly for the supplies. The cabin agents are also responsible for stocking the aircrafts with soft drinks, dry foods, pillows, blankets and magazines. Finally, like the cleaning supplies these items are purchased through vendors designated and paid by Delta. Delta sets the level of supplies that are to be kept on hand.

Delta supplies the vehicles utilized by the Employer's crews in their work. These vehicles include 16 lift trucks, 9 service vans and 9 lavatory trucks, which are based in the warehouse area of the Delta Cabin Facility. Delta repairs and maintains these vehicles. The only equipment that the Employer owns on site is one pick-up truck and some office equipment.

The Employer interviews, hires, and sets the wage and benefit rates of its cabin and lavatory agents independent of Delta. Such matters as calling off sick, workers compensation, vacation, etc. are handled independently by the Employer. The employees identification cards and uniforms (which are provided by the Employer) indicate that they are the Employer's employees and apparently do not reference Delta. It appears, however, that Delta has certain uniform requirements and if it so desires, may object to certain aspects of the uniforms of the Employer's employees.

Delta requires that the Employer's employees comply with governmental regulations and undergo an FBI criminal check, submit to a drug test, and fill out the appropriate paperwork related to potential immigrant status. Delta has the contractual authority to review such personnel records. Similarly, the Employer provides a master employee list to Delta every Wednesday, because Delta is apparently required by the Transportation Security Administration (TSA) to provide a list of all persons who have access to the Airport Operations Area (AOA) in order that a match may be done with a known terrorist list.

Delta may report any substandard behavior by the Employer's employees, but the Employer will independently investigate any such report and determine what, if any, discipline is to be issued to the offending employee. There is no contractual provision giving Delta the right to direct the immediate removal, suspension or discharge of the Employer's employees.

Cabin agent is considered the entry level position, with elevation to lavatory agent being possible with further training. With respect to training, Delta provides training for the Employer's trainers who, in turn, train the Employer's employees utilizing materials provided by Delta. These materials are in written form and contained on CD Roms. As a part of its contract with Delta, the Employer must insure that cabin and lavatory agents receive the training dictated by Delta. In addition to his/her original cabin training, Delta requires that lavatory employees go through a 3½ hour CD Rom-based course. Delta has dedicated a trainer to Cincinnati who is responsible for all training at that location, as well as a compliance officer who audits the Employer's training records once a month.

When cabin employees first arrive at work, they sign in on a timesheet and check the posted schedule to determine which truck and crew they have been assigned. The crew is assigned a geographic zone at the airport terminal and services the planes that come into their zone. Cabin agents utilize the lift trucks and vans provided by Delta to perform their duties. Once assignments are made the "lead agent" does a "pre-op" inspection of the truck, which includes a walk around the vehicle to inspect, for example, the condition of the tires and check to see whether the vehicle has been fueled. Pre-op inspections are done utilizing check-off sheets developed by Delta's Ground Support Equipment (GSE) group. The pre-op inspection is mandated by Delta. Another agent assigned to the van will check and stock the items that are carried in the van.

A flight manifest of all arriving and departing Delta aircraft – a document referred to as a "JFIL" – is utilized by cabin crew supervision to develop the cleaning schedule for the cabin agents. The size of the aircraft and duration of the flight will influence the number of employees that he/she may assign as a crew. It will also influence the number of zones to be worked. For this reason, JFILs are provided by Delta to the Employer several times a day.

If the vehicle being utilized by the crew is a lift truck, a guide person assigned to the crew assists in directing the vehicle to the plane. The truck stops 15 feet from the aircraft – the outer perimeter of the "circle of safety" developed by Delta. The guide

person then helps guide the truck as it approaches the aircraft. The truck, by Delta mandate, is required to stop every 5 feet as it backs up to the plane to ensure that there are no obstructions in the way. Once a lift truck has reached the cabin door, the aircraft's flight attendant gives the "thumbs up" and partially opens the door allowing the cabin agents to open it fully and enter the aircraft. The lead driver of the crew assigns specific individuals to clean specific areas of the cabin. For example, an individual may be assigned to clean the lavatories, another to clean the galleys, and possibly one or two others to clean the cabin area and take the garbage out. The lead person completes a check-off list on what is done on every aircraft serviced, to assist Delta in its auditing of the Employer's performance.

Cleaning is classified as Passive Active Flight (PAF), Remain Overnight (RON) or Cabin Service Intensive Clean Criteria (CSIC). A PAF cleaning is performed on aircraft that arrive at the terminal, but depart again that day. Delta has a time standard for the cleaning of such aircraft varying from 7 to 10 minutes for the "first class" cabin area and 14 to 20 minutes for the "coach" cabin. The plane must be "given back" to the Delta gate agent at least 30 minutes before departure. A RON cleaning pertains to cleaning a plane which is at the terminal overnight, which is more detailed than a PAF cleaning. This type of cleaning is expected to take from 1 to 1½ hours. A CSIC cleaning is more intensive than a RON cleaning. A CSIC cleaning involves the removal of seats by Delta personnel, the removal and cleaning of life vests, seat pockets, back rests, etc. It also includes a thorough cleaning of the galley area. This type of cleaning is expected to take 2 to 2½ hours. Delta evaluates the Employer's performance on its ability to meet these time targets.

All of the requirements for each type of cleaning are set forth in the Delta Ground Operations Manual (GOM). The GOM is accessed on the internet, but is not available to the general public. It must be accessed through the Delta website and is password protected. The password to access the GOM has been provided by Delta to the Employer's management. The GOM describes, in detail, the work to be performed by the Employer's employees such as scrubbing floors under all carts, removing the flight deck trash, and replacing bags. In this regard, cabin service agents are given "task cards" which have been developed by Delta and are used essentially as a check-off list for cleaning employees. These cards describe in minute detail the cleaning of the cabin and lavatory areas. The employees also receive instructional packets published by Delta on how to clean an aircraft.

A flight attendant or someone else on Delta's staff may point out minor issues to the Employer's employees, such as noting lavatory odors or asking the employee to provide more supplies. Employees have been instructed that when this occurs, they should take care of the matter. If an employee is asked to perform a task out of the ordinary, they are to refer the issue to their supervisor or the Employer's duty manager.

Lavatory agents also sign in utilizing a time sheet kept at the Delta Cabin Facility. Their duties include reviewing the supervisor's worksheet which indicates the truck they are to utilize and who is their "guide person" for the day, performing a pre-op on the

lavatory truck to make certain that it has been serviced, fueled and has no noticeable damage, turning in a GSE sheet to supervision, pulling up the JFIL for the day, and working with their supervisors to determine what zone they will work in that day. The JFILs dictate the order of work and staffing in zones. Once the lavatory truck has been checked out, the lavatory agents travel to the zone that they are to work in that day. They then service planes in the zone based upon a schedule linked to the aircrafts' arrival and departure times.

The trucks utilized by the lavatory employees have a large tank and pumping system on the back. They are designed to offload lavatory waste from aircraft and to input cleaning solutions into the lavatory system. As the lavatory agent approaches an airplane, he/she stops 15 feet from the aircraft – the outer perimeter of the “circle of safety” developed by Delta. The guide person then exits the truck and helps guide the truck while it backs up to the aircraft. Once they are at the requisite distance from the aircraft, a “Y-adapter” on a hose is utilized to hook up the truck to a hole on the aircraft’s fuselage. Once the Y-adapter is affixed, a donut like device inside the aircraft must be undone by the lavatory agent. The emptying of raw sewage then takes place and the lavatory agent is responsible for monitoring the Y-adapter to make certain that no fluid leaks. Once the waste is dumped into the truck, that particular hole is flushed with four or five gallons of cleaning solution. Then five to 10 gallons of backfill will be put into the lavatory system. Delta utilizes time flow studies to evaluate the Employer’s performance.

The lavatory guide person goes into the aircraft to make certain that the toilet flushes. The Employer asserts that it attempted to convince Delta personnel that this flush check could be performed by a cabin agent already in the plane, however, Delta continues to require the Employer to utilize the guide person for this flush check. The Employer also asserts that it unsuccessfully attempted to convince Delta that instead of utilizing one guide person per truck, that the process could be performed with a ratio of one guide person to every three or four trucks.

Once a truck is full of waste it is driven to the “trichulator room” or “the ranch” and emptied. Delta requires that the lavatory agents maintain a log of every aircraft that they have serviced and how much fluid has been put in each aircraft. These records are audited by Delta once a month.

Delta has a ground tower at the airport to coordinate operations after the planes are released from the air traffic control tower’s personnel. The Employer also maintains one or two dispatchers in this tower to coordinate work with Delta. For example, if a flight attendant feels that some further cleaning or stocking of a plane should be done, he/she will contact the Delta tower. It appears that his/her communication will be with Delta personnel in the tower who in turn advises the Employer’s dispatcher, who initiates a “call-back” to the plane. It appears that call-back work is ordinarily performed by call-back crews maintained by the Employer, but a regular crew could also be sent to perform such work. The Employer’s personnel communicate on portable radios supplied by Delta on frequencies established by Delta.

Delta has the right to access the personnel records that it requires the Employer to keep – such as those pertaining to the identity of the employee, background checks, and the training that the employee has received. Delta requires the Employer to keep exhaustive records on all aspects of all the activities it performs for Delta. These records are audited periodically. The work of the Employer's employees is also audited. These records include not only an evaluation of *what* is done or not done, such as specific acts of cleaning, failure to stock adequate items, and the failure to properly place certain items, but also *how* it is done, for example, a failure to utilize a certain brush in lavatory cleaning. Delta audits the timeliness of work performed. The Employer receives follow-up e-mails and score cards as the result of inspections and audits. Fifty to sixty audits of various aspects of the Employer's operations and work of its employees are done each month. There is a monthly percentage reflecting the adequacy of the Employer's operations that shows which specific areas of the Employer's operation passed or failed. The Employer is given a time line of fifteen days in which to take corrective action on a failed item. If the problem can be corrected by retraining the employees involved, this is done. If specific employees can be identified, their sub-standard work may be reflected in the Employer's evaluation of the employee. If the Employer's score falls below 80 percent, Delta is allowed to place the work out for bid by a new contractor.

III. THE LAW AND ITS APPLICATION

Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include "any person subject to the Railway Labor Act." 29 U.S.C. Section 152(2). Similarly, Section 2(3) of the Act provides that the term "employee" does not include "any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. Section 153(3). The RLA, as amended, applies to rail carriers and to:

every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner or rendition of his service. [45 U.S.C. Sec. 151 First and 181.]

The RLA was extended to air carriers by amendments enacted in 1936. An employer subject to the RLA is under the jurisdiction of the National Mediation Board (NMB).

The NMB uses a two-pronged jurisdictional analysis where the company is a separate corporate entity that does not fly aircraft for the public transportation of freight or passengers. Under the first prong of the test, known as the "ownership or control" prong and derived from the language of the Railway Labor Act, the NMB determines whether a common carrier exercises direct or indirect ownership or control of the entity. Thus, 45 U.S.C. Sec. 151 and 181 states that "the term 'carrier' includes . . . any company which is directly or indirectly owned or controlled by or under common control with any

carrier." *Delpro Co. v. Railway Carmen*, 519 F. Supp. 842, 848 and fn. 14 (D.C. Del. 198), affd. 676 F.2d 960 (3d Cir. 1982), cert. denied 459 U.S. 989 (1982). See also *Ground Services, Inc.*, 7 NMB 509, 509-510 (1980). The second prong of the test, known as the "function" prong, is also derived from 45 U.S.C. Sec. 151. For the NMB's jurisdiction to attach to the noncarrier under the carrier's control, the RLA states that the entity must be one "which operates any equipment or facilities or performs any service . . . in connection with the transportation, receipt, delivery . . . transfer in transit . . . and handling of property transported." *Delpro Co.*, supra, 676 F.2d at 964. In this part of the test, the NMB determines whether the work is traditionally performed by employees of air or rail carriers. The NMB requires that both prongs of the test be met in order for it to assert jurisdiction under the RLA. *United Parcel Service*, 318 NLRB 778, 779-780 fn. 7 (1995), enf'd. 92 F.3d 122 (D.C. Cir. 1996). See, *John Menzies, PLC, d/b/a Ogden Ground Services, Inc.*, 340 NLRB 1167, fn. 1 (2003).

In the instant case, the parties stipulated that the employees sought to be represented by the Petitioner perform work that is traditionally performed by employees of air carriers. Thus, only the issue of ownership or control remains for consideration. Because there is no evidence of any carrier ownership interest in the Employer, the only remaining consideration is the degree of control exerted by Delta over the Employer.^{3/} To determine whether there is sufficient carrier control over a company to warrant the NMB to assert jurisdiction, the NMB examines several factors, including: the extent of the carrier's control over the manner in which the company conducts its business; access to the company's operations and records; role in personnel decisions; degree of supervision of the company's employees; whether employees are held out to the public as carrier employees; and control over employee training. *Signature Flight Support*, 32 NMB 214 (2005); *John Menzies PLC, d/b/a Ogden Ground Servs., Inc.*, 30 NMB 405 (2003); *Signature Flight Support of Nevada*, 30 NMB 392 (2003).

The Board has a general practice of referring cases to the NMB when a party raises a claim of arguable NMB jurisdiction. However, "[t]he Board has not referred to the NMB cases presenting jurisdictional claims in factual situations similar to those where the NMB has previously declined jurisdiction." *United Parcel Service, Inc.*, 318 NLRB 778, 780 (1995). See also, *E.W. Wiggins Airways*, 210 NLRB 996 (1974), and *Air California*, 170 NLRB 18 (1968) cited therein. I believe that this exception controls the instant matter.

The facts relating to Delta's control of the Employer and its employees are nearly identical to those in *Sky Valet*, supra. In *Sky Valet*, the NMB, rather than the Board, was determined to have jurisdiction over the two employers involved and the Board declined to assert jurisdiction.

^{3/} It is well settled that Delta is an employer falling within the jurisdiction of the NMB. See, e.g., *In the Matter of the Representation of Employees of Delta Air Lines, Inc., Pilot Ground Training Instructors*, 29 NMB 408 (2002); *In the Matter of the Representation of Employees of Delta Air Lines, Inc., Fleet Service Employees*, 28 NMB 2 (2000); *Delta Airlines, Inc.*, 27 NMB 237 (2000).

Thus, in *Sky Valet*, Delta provided a 63-page *Contractors Guide to Delta Cabin Service*, which appears akin to the GOM in the subject case. The *Contractors Guide* provided that “[t]he cleaning of all Delta aircraft must be accomplished by strict adherence to Delta’s established specifications and procedures.” The *Contractors Guide* provided detailed instructions regarding many similar activities as Delta controls in the instant case, including with respect to drug screening, safety, equipment maintenance and vehicle inspections, and procedures for cleaning and stocking water and liquor, and servicing lavatories. The *Guide* also provided for reports utilized in quality assurance – a requirement also imposed on the Employer and its employees.

Further, in *Sky Valet*, like here, Delta provided the two employers involved with office facilities, vehicles, warehouse facilities, equipment, and supplies. In addition, the crews in *Sky Valet* used Delta radios and Delta frequencies to communicate with each other and with the Delta dispatcher, Delta provided the employers’ personnel with schedule and gate information, and the contractors provided Delta with reports for each flight serviced.

Similarly, in *Sky Valet*, Delta flight attendants inspected each aircraft after servicing and reported on any problems to Delta dispatch, who directed follow-up service. Likewise, in the instant case a flight attendant occasionally directly points out a deficiency in performance of the contracted services, and the Employer’s employees have been instructed to rectify the matter in such situations – assuming that it is not an unusual request. Flight attendants and other Delta personnel may also report issues about the Employer’s service to Delta tower personnel, who will convey it to the Employer’s dispatcher who then can order call-back service.

Likewise, in *Sky Valet*, like here, contractors made voluminous daily operations reports to Delta and Delta supervisors can bring complaints about employee conduct or appearance to the attention of the contractors. Although in the case sub judice, it is the Employer who makes the final determination regarding an offending employee – the Board did not note any power on the part of Delta in *Sky Valet* to demand more of the contractors. Moreover, in *Sky Valet* the contractors were required to take Delta training classes, use Delta training materials and videos for their employees, and to have their employees trained by Delta personnel or by their own personnel who had been certified by Delta. In the instant matter there appears to be little distinction from *Sky Valet* in this area. Thus, the Employer’s trainers are themselves trained by Delta and the employees sought to be represented are all trained utilizing Delta generated material.

Finally, in *Sky Valet* daily work plans were drawn up by either Delta agents or contractors’ agents, depending on availability. This is somewhat of a distinction from the instant case where there is no indication that Delta personnel directly draw up work plans. However, Delta’s constant updating of Employer personnel regarding flights through use of the JFIL’s has the biggest impact on how work plans are formulated, thus constituting indirect control of such activity. Accordingly, I find that such a minor distinction between the two situations does not substantially detract from their similarities.

Under the circumstances here, I conclude that the instant case is so similar to that of *Sky Valet* that its outcome is dictated by the finding in that case.^{4/}

IV. CONCLUSION AND FINDING

Based upon the entire record in this matter and in accordance with the discussions above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. It will not effectuate the purposes of the Act to assert jurisdiction in this case.

V. ORDER

IT IS ORDERED that the petition filed in this case be, and it hereby is, dismissed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, N.W., Washington, D.C. 20570-

^{4/} The Petitioner relies primarily on the cases of *Ogden Aviation Services*, 23 NMB 98 (1996), and *Miami Aircraft Support*, 21 NMB 78 (1993), to support its assertion that the Board, rather than the NMB, has jurisdiction over this matter. Both cases are clearly distinguishable from the facts of this case. Thus, in *Ogden*, the labor organization sought to represent employees performing equipment maintenance, cargo loading and unloading, baggage sorting, delivery and pick-up, cabin cleaning, building maintenance, mechanical parts stores, passenger check-in, skycap, and food services for fifteen carriers at San Francisco's International Airport. In *Ogden*, unlike the instant case, the carriers did not have general access to the employer's operations and records; the employer used and maintained most of its own equipment; and the employer maintained its own break rooms, office space, parking and maintenance facility. In *Miami Aircraft Support*, the employer provided ground services (including loading and unloading cargo and passenger baggage, de-icing, cabin cleaning, and aircraft push-back services), for various air carriers at various locations. In *Miami*, unlike the instant case, the carriers did not provide any training other than required by FAA regulations. More importantly, in neither *Ogden* nor *Miami*, was there evidence that the employers were subject to the detailed instructions for performing work -- a key factor in the Board's determination in *Sky Valet* -- nor the constant auditing and evaluating of work performance. Finally, the Petitioner asserts that *Sky Valet* is distinguishable from the instant matter because there the carrier "drew up the work plans followed by the service company and the union dispatch directed service company crews to return to an aircraft if the cleaning was unsatisfactory; and because the service company employees took training classes provided by the carrier." Although it appears that in *Sky Valet*, Delta, on occasion, exercised direct control over the employees' time and directly trained the employees of their employer; I am satisfied that the instant record shows a sufficient degree of control over the Employer's operation to warrant my reliance on *Sky Valet*. Thus, like in *Sky Valet*, and as discussed previously in this decision, Delta personnel have directed the Employer's employees to perform additional tasks and unless the request is extraordinary, the Employer's employees are required to comply with the request. In addition, even though it appears that Delta personnel do not directly train the Employer's employees, they do train the Employer's trainers and Delta provides the CD Roms that the Employer utilizes to train employees.

0001. This request must be received by the Board in Washington by 5 p.m. (EST) on **March 31, 2006**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 17th day of March 2006.

/s/ Gary W. Muffley

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Classification Index

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